STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2361	Date of Decision: 10/22/03
Appeal Type: [X] Bid Protest	[ ] Contract Claim
Procurement Identification: Under FSU Project No. FSU 04-007	
Appellant/Respondent: Advanced Fire Protection Services Frostburg State University	

Decision Summary:

Responsiblity - Prior Experience of Employees or Company Officials - Absent specific language to the contrary, the experience of employees or company officials gained prior to the formation of a corporation or other business entity may be considered in determining whether the bidder meets the experience criteria.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Advanced Fire Protection Services	)	
	)	**Docket No. MSBCA 2361**
Under FSU Project No. FSU 04-007	)	

APPEARANCE FOR APPELLANT: **Mark J. Muffoletto, Esq.**
Mark J. Muffoletto L.L.C.
Ellicott City, Maryland

APPEARANCE FOR RESPONDENT: **Anne L. Donahue**
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY (ARK Systems, Inc.): **None**

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its bid protest that it is a responsible bidder.

Findings of Fact

1. Frostburg State University (FSU or University) issued an Invitation for Bids (IFB) for the maintenance and service of its existing fire and security alarm systems on the campus in Frostburg, Maryland. The contract was to be for a three-year term with the option of two one-year extensions. FSU received timely bids from four bidders. Appellant provided the lowest bid, at $86,000; the highest bid was $131,657.
2. Appellant was deemed by the FSU Procurement Officer to be not responsible because it allegedly did not comply with the specifications that required it to demonstrate its ability to perform the job with the requisite amount of skill and experience. The Contract was awarded to the next lowest bidder, ARK Systems, Inc., whose bid was $87,040. Appellant timely protested this action.

3. Pursuant to the IFB specifications, the bidder was required to have Aat least three (3) years of successful experience as a fire and security alarm installer and service specialist.@ The bidder also had to Abe able to demonstrate an expert knowledge of the University=s existing systems,@ and the assigned service technician had to have Athree (3) years experience as a fire alarm and security specialist.@ Finally, the bidder had to supply references from five businesses for which services comparable to those sought by the University had been provided.

4. Appellant has not been in business for three years. According to records from the Maryland State Department of Assessments and Taxation, Appellant was formed on September 24, 2001 as a limited liability corporation, owned by one individual, Mr. Michael Peters.

5. The record reflects that Appellant had, at the time it submitted its bid and at the time of the hearing of the appeal, several employees on its payroll, one of whom would be the technician assigned to FSU, who met the three year experience requirements of the IFB regarding maintenance and service of Simplex fire alarm and security alarm systems, as confirmed in the Procurement Officer=s final decision.

6. We further find that the references that Appellant gave FSU did confirm the type of experience required in the solicitation. Appellant provided a total of six references. The National Security Agency confirmed that a contract with Appellant existed, and The Greens@Leisure World II also confirmed that a contract existed. From these contracts, experience of several years duration could be ascertained. Two other references, the Baltimore County School System and University of Maryland Baltimore County, stated that Appellant=s work was only related to their sprinkler

maintenance, not to fire and security alarm systems. However, the record reflects that sprinkler maintenance work requires some knowledge of alarm systems. The Holiday Inn on the Hill provided a good reference for Appellant but could not confirm any experience with FSU=s particular type of systems (Simplex in all but one building and an AEdwards= system in the remaining building). Finally, Henbeck Sprinkler Inspection Company provided a reference that established a two year relationship supplemented by a letter at the hearing that reflected a five year sub-contract relationship. The totality of the references provided by Appellant support its assertions of experience and competence in the systems it was being asked to service at FSU.

Decision

Absent specific language to the contrary, the experience of employees or company officials gained prior to the formation of a corporation or other business entity may be considered in determining whether a bidder meets experience criteria. Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA &82 (1984); Independent Testing Agency, Inc., MSBCA 1908, 5 MSBCA &386 (1995). This is essentially a discretionary determination. Aquatel Industries, Inc., *supra*; Jailcraft, Inc., MSBCA 2147, 5 MSBCA &475 (1999). In this appeal there was a responsibility criterion of Athree (3) years of successful experience as a fire and security alarm installer and service specialist,@ i.e. the bidder had to be in existence for three (3) years. There was also a responsibility criterion that employees who would perform under the contract have experience and that the assigned service technician have Athree (3) years= experience as a fire alarm and security specialist.@

There was no language in the IFB that precluded counting the experience of employees or officials in determining whether

Appellant itself met the three years experience criterion[1], even though Appellant was not incorporated until September of 2001. Based on our review of the record in this appeal, where the consideration of the experience of employees is not precluded by the IFB, we find the Procurement Officer could have found that Appellant met the experience criteria of the IFB by reference to its employees. Thus, Appellant could have been found responsible and, as the low bidder, would have received the award. However, it also appears from the record that the Procurement Officer may not have been aware that he could have found Appellant to be responsible based on the experience of its employees or officials.

Accordingly, the appeal is sustained, and the matter is remanded to Respondent so that the Procurement Officer may consider whether Appellant is responsible in light of the experience of its employees or officials.

So Ordered this day of October, 2003

Dated:

Robert B. Harrison III
Board Member

I Concur:

_____
Michael J. Collins
Board Member

[1]See Independent Testing Agency, Inc., *supra*, in which the specifications specifically precluded consideration of the experience of the employees in meeting the requirement that the business entity have five (5) years of experience.

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2361, appeal of Advanced Fire Protection Services under FSU Project No. FSU 04-007.

Dated:

Michael L. Carnahan
Deputy Recorder